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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

KHALED AL HASSEN

Plaintiff,

v.

SHEIKH KHALIFA BIN ZAYED AL NAHYAN,
an individual; SHEIKH MOHAMED BIN
ZAYED AL NAHYAN, an individual;
GENERAL SAEED HILAL ABDULLAH AL
DARMAKI, an individual; and DOES 1 to 10,
inclusive,

Defendants.

Case Number:
2:09-CV-1106-DMG
(FMOx)

**Supplemental
Statement of Interest**

Monday, March 28, 2011

**SUPPLEMENTAL STATEMENT OF INTEREST
OF THE UNITED STATES OF AMERICA**

INTRODUCTION

The United States explained in its Statement of Interest filed on February 24, 2011, that the Vienna Convention on Diplomatic Relations (“Vienna Convention”), 23 U.S.T. 3227, 500 U.N.T.S. 95, renders ineffective the attempted service of process on Defendant Sheikh Mohamed Bin Zayed Al Nahyan (“Sheikh Mohamed”). *See* Doc. #75. Attempting to effect service

1 through the Ambassador and the Military Attaché of the United Arab Emirates
 2 (“UAE”) violates the Vienna Convention’s prohibition on the assertion of
 3 jurisdiction over accredited diplomatic agents, *see* Art. 31, and the instruction
 4 that the “person of the diplomatic agent shall be inviolable.” Art. 29. In response
 5 to the Court’s order to show cause why service upon Sheikh Mohamed should
 6 not be quashed, Plaintiff does not contest that both the UAE Ambassador and the
 7 UAE Military Attaché are diplomatic agents to whom the Vienna Convention
 8 applies. Instead, Plaintiff contends that the protections of the Vienna Convention
 9 should not extend to the present circumstances and asks the Court to carve a new
 10 exception to the immunity afforded diplomatic agents in the international
 11 agreement. The United States briefly will respond to the issues raised by
 12 Plaintiff.

13 DISCUSSION

14 1. Plaintiff does not contest that accredited diplomatic agents “shall
 15 enjoy” immunity from the civil jurisdiction of United States courts. Art. 31. Nor
 16 does Plaintiff contest that requiring diplomatic agents to transmit a summons and
 17 complaint to Sheikh Mohamed constitutes an assertion of jurisdiction. Instead,
 18 Plaintiff contends that the “commercial activity” exception in Article 31(1)(c)
 19 applies. *See* Pl.’s Response at 19-20. Article 31(1)(c) recognizes an exception to
 20 diplomatic immunity when “[a]n action relat[es] to any professional or
 21 commercial activity exercised by the diplomatic agent in the receiving State
 22 outside his official functions.” Plaintiff urges the Court to apply this exception
 23 because “a primary basis of the claim against the Defendants is that their acts of
 24 torture arose out of and related to commercial competition between two
 25 competing trading companies with significant business in the United States.”
 26 Pl.’s Response at 19. Regardless of Plaintiff’s contention that this case relates to
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1 commercial activity, Plaintiff's argument misses the mark because finding an
2 exception to a diplomatic agent's immunity from jurisdiction requires a finding
3 that the one otherwise entitled to immunity from jurisdiction was engaged in
4 commercial activity. Art. 31(1)(c). Thus, in this case, finding an exception
5 would require that the diplomatic agents themselves engaged in commercial
6 activity – not the Defendants. Plaintiff does not allege that the UAE Ambassador
7 and Military Attaché personally engaged in commercial activities. Therefore,
8 attempting to require them to transmit a summons and complaint to Sheikh
9 Mohamed clearly constitutes an assertion of jurisdiction over them in violation of
10 Article 31(1) of the Vienna Convention.

11 2. Plaintiff acknowledges that the inviolability of diplomatic agents
12 pursuant to Article 29 is “advisedly categorical” and “strong,” and that the United
13 States has taken the position (and courts have agreed) that foreign officials who
14 enjoy immunity and inviolability cannot be used as involuntary service agents.
15 *See, e.g., Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004), *cert. denied*
16 126 S. Ct. 2020 (2006); *Ye v. Zemin*, 383 F.3d 620, 629-30 (7th Cir. 2004);
17 *Hellenic Lines Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965). Plaintiff responds
18 by attempting to minimize the significance of the violation and by citing cases
19 that are distinguishable from this case. Pl.'s Response at 12-15. None of the
20 cases on which Plaintiff relies considered the application of the Vienna
21 Convention along with a specific request by the United States for the invalidation
22 of service. *See* Pl.'s Response at 13-15. None of these cases dealt with the
23 assertion of jurisdiction over diplomatic agents¹ in order to transform them into
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25 ¹ Each of the cases on which Plaintiff relies ultimately involved a suit against
26 a foreign state and each was decided before the enactment of the Foreign Sovereign
27 Immunities Act (“FSIA”), 28 U.S.C. § 1602, *et seq.* The FSIA excludes the
28 possibility of service by mail on an embassy, providing instead for service to a

1 involuntary service agents. And none of them ultimately involved a suit against a
2 foreign official, either within or outside the United States. Moreover, the one
3 case that considered the Vienna Convention looked at Article 22, rather than the
4 articles at issue in this case.

5 3. Plaintiff attempts to trivialize the nature of the treaty violation and
6 second guesses the Executive Branch's interpretation of the treaty and the
7 consequences of permitting service in a manner that is inconsistent with the
8 treaty. *See* Pl.'s Response at 16-18. However, the text of the Vienna Convention
9 is unambiguous. It prohibits a court's assertion of jurisdiction over diplomatic
10 agents (Article 31) and establishes the inviolability of diplomatic agents (Article
11 29). A court order permitting a plaintiff to effect service of process on a third
12 party through service on a diplomatic agent is necessarily an assertion of
13 jurisdiction over the diplomat and an infringement of the diplomat's inviolability.
14 No provision of the Vienna Convention permits such use of diplomatic agents,
15 and this Court must reject Plaintiff's request to interpret the Vienna Convention
16 to include exceptions not contained in its plain language. Even if the treaty
17 language were less clear, the Court should give substantial deference to the
18 Executive Branch in its interpretation of the United States' treaty obligations,
19 Doc. #75, at 5-6, because the Department of State is uniquely competent to assess
20 the foreign relations of the United States, including the negotiation,
21 interpretation, and implementation of treaties. The Department of State has
22 concluded here that "[a]llowing the improper service upon Sheikh Mohamed
23 through diplomatic agents to stand would seriously impact the United States'
24 ability to conduct foreign relations," *see* Doc. #75-1, at 2, and Plaintiff is not in a

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26 foreign state through diplomatic channels. *See* Eileen Denza, *Diplomatic Law* 152
27 (2d ed. 1998).

1 position to contest this conclusion. The reciprocal implications of permitting
 2 service on an Embassy as a means to effect service on officials of that foreign
 3 state could be significant. The Department of State, including its overseas
 4 embassies and other posts, does not act as the agent of its employees for purposes
 5 of service of process for suits against them in their individual capacities. *See* 22
 6 C.F.R. § 172.2(c). U.S. Embassies abroad are not authorized by the Department
 7 to accept service on U.S. officials in such suits.² Yet, under Plaintiff's theory, the
 8 United States would be barred from objecting under the Vienna Convention
 9 should a foreign court authorize service via a U.S. Embassy.

10 4. Relying on published Department of State guidance, Plaintiff
 11 observes that "official acts immunity is not a prima facie bar to the exercise of
 12 jurisdiction by U.S. Courts. Rather, it is an affirmative defense to be raised
 13 before the . . . court," Pl.'s Response at 4 (quoting Department of State,
 14 Diplomatic and Consular Immunities: Guidance for Law Enforcement and
 15 Judicial Authorities, at 12 (2010) ("State Department Guide"), at Doc. #77-1).³
 16 But Plaintiff's discussion of official act immunity is inapposite, because

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 19 ² Even when the United States is itself sued abroad, the United States will
 20 accept service via the Embassy only through diplomatic channels (that is, under
 21 cover of a diplomatic note from the Ministry of Foreign Affairs).

22 ³ Plaintiff makes much of the fact that the State Department Guide permits
 23 law enforcement officials to stop a diplomatic agent and issue a traffic citation.
 24 Pl.'s Response at 2-3, 17. However, the United States is not thereby asserting its
 25 domestic jurisdiction over the diplomatic agent. While there may be consequences
 26 outside the U.S. legal system stemming from the issuance of citations (e.g., the
 27 Department of State has a "points" system for those with diplomatic drivers'
 28 licenses and will withdraw driving privileges or require the departure of those who
 pose a danger to the community), absent a waiver of immunity, there is no
 assertion of U.S. jurisdiction to compel any action with respect to the citations.

1 diplomatic agents enjoy status-based immunity under the Vienna Convention.⁴
 2 As diplomatic agents, the Ambassador and Military Attaché “enjoy the highest
 3 degree of privileges and immunities” including “complete personal inviolability.”
 4 Doc. #77-1, at 3. Accordingly, they are completely immune from the courts’
 5 criminal jurisdiction, and immune from civil jurisdiction except in four limited
 6 circumstances not applicable here.⁵ *Id.*; see Vienna Convention, Art. 29, 31.
 7 Because permitting a diplomatic agent to serve as an involuntary service agent
 8 would violate the diplomat’s immunity and personal inviolability, this Court
 9 should join the D.C. Circuit and the Second Circuit, among other courts, in
 10 holding that service of process on a diplomat as the agent of a foreign
 11 government violates the Vienna Convention. *Tachiona*, 386 F.3d at 221-24;
 12 *Hellenic Lines Ltd.*, 345 F.2d at 981 (holding that “Ambassador is not subject to
 13 service of process” pursuant to the Vienna Convention).

14
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 16 ⁴ Plaintiff repeatedly refers to immunity and, in particular, to “official acts
 17 immunity,” Pl.’s Response at 4, 13 & n.10, but the United States has not to date
 18 addressed the applicability of immunity as to any Defendant other than Sheikh
 Khalifa, whose head-of-state immunity the Department of State recognized.

19 ⁵ Plaintiff attempts to deny the immunity of the diplomatic agents at issue
 20 here by asserting that it was the Embassy’s administrative and technical staff that
 21 “signed for the certified mail from Plaintiff.” Pl.’s Response at 3. But Plaintiff
 22 sent the summons and complaint to the diplomatic agents as “conduits for service
 23 of process for others being sued,” Pl.’s Response at 5, 19, intending them to
 24 forward the documents to Defendants, in violation of the Vienna Convention.
 25 Even if attempted service on a member of the administrative and technical staff
 26 would have been in compliance with the Court’s order, such individuals enjoy full
 27 personal inviolability and the limited exception to their civil immunity “for acts
 performed outside the scope of their duties,” Art. 37(2), was intended to allow
 them to be subject to suit for their own private actions, not to allow them to
 become agents for service of process on other government officials.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Statement of Interest filed on February 24, 2011, Doc. #75, the United States respectfully requests that the Court vacate its Order of March 3, 2010, and invalidate the service upon Defendant Sheikh Mohamed because service upon him through a diplomatic agent constituted a clear violation of the Vienna Convention on Diplomatic Relations and could seriously harm the foreign policy interests of the United States.

Dated: March 28, 2011

Respectfully submitted,

/s/ Eric J. Beane

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CERTIFICATE OF SERVICE

On March 28, 2011, undersigned counsel for the United States caused a copy of the foregoing Supplemental Statement of Interest to be sent to the following counsel of record via the Court's CM/ECF system:

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